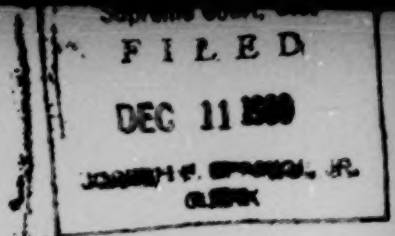


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90-943



No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOE CLARK,

Petitioner,

v.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Whether Title VII's ninety day statute of limitations is tolled during the time a race discrimination case is deferred to and pending in a state administrative agency.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

JOE CLARK,

Petitioner,

v.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

The petitioner, JOE CLARK, respectfully requests that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit issued in the above-entitled proceeding on September 12, 1990.

OPINIONS BELOW

The order of the Court of Appeals for the Seventh Circuit is reprinted in the appendix hereto, pp. 1-4, *infra*.

The minute order announcing the decision of the United States District Court for the Northern District of Illinois (Shadur, D.J.) is reprinted in the appendix hereto, p. 8, *infra*.

JURISDICTION

The judgment and opinion of the Seventh Circuit Court of Appeals affirming the District Court's order dismissing Clark's Title VII lawsuit for failing to file his complaint within ninety-days of the issuance of the notice of right to sue was entered on September 12, 1990. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

Clark filed a charge with the Illinois Fair Employment Practices Commission (FEPC), which is now the Illinois Human Rights Commission (HRC), on December 26, 1978 in which he charged Western Union with discrimination because the company demoted him from his position as a Major Account Representative in the SS&S division because of his race (Black). App. 9-10. The charge was received by the Equal Employment Opportunity Commission (EEOC) on December 27, 1978. App. 10. The EEOC sent Clark a letter on December 28, 1978 and informed Clark 1) that the EEOC would "hold action on this charge until . . . notified of the **final disposition** by the Illinois FEPC," and 2) that the EEOC would review the FEPC's disposition and make a decision about how to proceed in Clark's case. App. 12. After an investigation, the FEPC issued a Notice of Substantial Evidence which stated that there was substantial evidence that an Unfair Employment Practice had been committed by Western Union. App. 11.

On November 19, 1979, Clark filed his Complaint Of Unfair Employment Practices against Western Union. In 1983, the HRC affirmed the findings and recommendations of the administrative law judge that Western Union discriminated against Clark on the basis of his race by demoting him from his Major Account Representative position on January 1, 1979, and ordered Western Union to reinstate Clark to his position, and awarded Clark back pay, benefits and seniority status.

Dissatisfied with the HRC's back pay formula, Clark sought administrative review in the Circuit Court on November 29, 1983. On May 15, 1984, the Circuit Court affirmed the HRC's decision as to back pay and refused to issue an order directing Western Union to reinstate Clark to his position.

When the Circuit Court refused to enforce the HRC's reinstatement order reinstating Clark to his position, Clark filed a petition for a Writ of Mandamus in the Illinois Supreme Court on June 4, 1984. On June 11, 1984, the Illinois Supreme Court denied Clark's Petition For Writ of Mandamus.

In June, 1984, Clark filed a notice of appeal. On March 21, 1986, the Illinois Appellate Court reversed the Circuit Court and held that the HRC abused its discretion in calculating the back pay award and remanded the case back to the HRC for a rehearing on damages. See *Clark v. Human Rights Commission*, 141 Ill.App.3d 178 (1986).

On November 30, 1987, during the pendency of the *Clark* case, on remand, before the HRC, the EEOC decided that it had no jurisdiction over Clark's discrimination charge pursuant to the Supreme Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). The EEOC mailed Clark a notice of right-to-sue which stated that

Clark had ninety-days from the date of receipt of the notice to seek judicial review. On December 4, 1987, the right-to-sue letter was delivered to Clark's post office box. On December 29, 1987, the letter was returned to the EEOC after it remained unclaimed for two weeks.

On October 11, 1988, Clark and his attorney visited the Chicago office of the EEOC to inquire about the status of Clark's case. App. 15. They were informed that the right-to-sue letter had been issued and returned unclaimed to the EEOC. App. 15. The original right-to-sue letter was given to Clark. App. 15. Thirteen days later, on October 24, 1988, Clark filed the instant action. On October 24, 1988, Clark also filed a motion to dismiss his case before the HRC because he did not feel the HRC could fairly hear his damages claim on remand. App. 18-19. On October 28, 1988, the HRC granted Clark's motion and dismissed his case.

On December 8, 1988, a District Court Judge dismissed Clark's Title VII complaint. The District Court held that Clark's Title VII complaint was untimely filed. On September 12, 1988, the Seventh Circuit issued an order which affirmed the decision of the District Court dismissing Clark's Title VII complaint. App. 1-6.

REASONS FOR GRANTING THE WRIT

The *Clark* case presents an important subject matter jurisdiction question for the Supreme Court to review; namely, whether a pending state court discrimination case tolls Title VII's ninety-day statute of limitations. The Seventh Circuit held 1) that Clark failed to meet the ninety-day requirement for filing his Title VII complaint

and 2) that the running of the ninety-day filing period was not tolled by his pending state court discrimination action or by principles of equitable tolling. See A.4. The Seventh Circuit's decision in *Clark* conflicts with three Supreme Court decisions and with a decision in the Seventh Circuit. See *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. 1566 (1990); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 410 (7th Cir. 1989).

I.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH *DONNELLY* WHICH HOLDS THAT A PENDING STATE COURT DISCRIMINATION ACTION TOLLS TITLE VII'S NINETY-DAY STATUTE OF LIMITATIONS.

First, the *Clark* case conflicts with the *Donnelly* case. In *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 410 (7th Cir. 1989), the Seventh Circuit held 1) that state courts and federal courts have concurrent jurisdiction over Title VII actions, and 2) that a pending state court discrimination action tolls Title VII's ninety-day statute of limitations. The Supreme Court reviewed the *Donnelly* case and affirmed the Seventh Circuit's decision. See *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. 1566 (1990). Therefore, *Donnelly* makes it clear that a pending state court discrimination action tolls Title VII's ninety-day statute of limitations. See *Donnelly*, 110 S.Ct. at 1568-1570; *Donnelly*, 874 F.2d at 410.

Donnelly requires this Court to ask one question: was the *Clark* case pending in a state court when the EEOC issued the notice of right-to-sue? The answer to this question is yes. Therefore, since the *Clark* case was pending before the HRC, Title VII's ninety day statute of limita-

tions was tolled by *Donnelly* and the *Clark* case should not have been dismissed by the District Court. *Donnelly*, 110 S.Ct. at 1568-1570; *Donnelly*, 874 F.2d at 410.

The facts establish that Clark filed his charge of racial discrimination against Western Union on December 26, 1978. App. 9-10. The EEOC sent Clark two letters which informed Clark that the EEOC would defer acting on Clark's charge until the HRC issued its final disposition. App. 12, 13-14. In 1983, the HRC affirmed the findings of an administrative law judge that Western Union discriminated against Clark on the basis of his race by demoting him and directed Western Union to reinstate Clark to his position and to pay him back pay and benefits. *Clark v. Human Rights Comm.*, 10 Ill. HRC 316; 8 Ill. HRC 100. In 1984, the Circuit Court affirmed the HRC's decision as to back pay. In 1986, the Appellate Court reversed and remanded the *Clark* case back to the HRC for a rehearing on damages. *Clark*, 141 Ill.App.3d at 186.

On November 30, 1987, while the *Clark* case was pending before the HRC on remand, the EEOC issued a notice of right-to-sue. On October 11, 1988, Clark received his notice of right-to-sue from the EEOC. App. 15. On October 24, 1988, Clark filed his Title VII complaint (App. 3), and a motion to dismiss his HRC action. App. 16-20. Finally, on October 28, 1988, the HRC dismissed Clark's HRC action. App. 3, Footnote 1.

The preceding facts establish 1) that the *Clark* case was pending in the HRC on November 30, 1987, when the EEOC issued its notice of right-to-sue; 2) that the *Clark* case was pending in the HRC on October 24, 1988, when Clark filed his Title VII complaint; and 3) that the *Clark* case was continuously pending in the HRC or in a state court for nine years, from December 26, 1978 when Clark

filed his charge, until October 24, 1988, when Clark filed his Title VII complaint. The *Clark* case conflicts with the *Donnelly* case because in both cases a state discrimination action was pending in an Illinois court or agency, but only in *Donnelly* was Title VII's ninety-day statute of limitations tolled. The Seventh Circuit erroneously decided the jurisdictional question in *Clark* by affirming the dismissal of Clark's Title VII complaint on the ground that it was untimely filed. See *Donnelly*, 110 S.Ct. at 1568-1570; *Donnelly*, 874 F.2d at 410. The Seventh Circuit, in effect, discriminated against Clark by failing to follow the *Donnelly* tolling rule. Therefore, since *stare decisis* applies to Title VII litigation, the *Clark* case must be reversed to make it consistent with other decisions in this Court and the Seventh Circuit. See *Donnelly*, 110 S.Ct. at 1568-1570; *Donnelly*, 874 F.2d at 410.

The Seventh Circuit spends considerable time in its order explaining 1) how the EEOC mailed a notice of right-to-sue to Clark's post office box; 2) how Clark failed to claim the letter; and 3) how the delay in filing the Title VII action was Clark's fault. App. 2-5. The *Donnelly* case makes these facts irrelevant. *Donnelly* holds that a pending state court discrimination action tolls Title VII's ninety-day statute of limitations. See *Donnelly*, 110 S.Ct. at 1568-1570; *Donnelly*, 874 F.2d at 410. Therefore, since Clark's case was deferred to and pending, on remand, before the HRC on November 30, 1987 when the EEOC issued its notice of right-to-sue, and was pending before the HRC on October 24, 1988 when Clark filed his Title VII complaint in federal court, the fact that Clark did not pick-up the notice of right-to-sue mailed to his post office box did not stop his federal case from being tolled. See *Donnelly*, 110 S.Ct. at 1568-1570; *Donnelly*, 874 F.2d at 410. Consequently, the Supreme Court should ignore the Seventh

Circuit's discussion about Clark's failure to pick-up his notice of right-to-sue because Clark's federal action was tolled while Clark's case was pending before the HRC. See *Donnelly*, 110 S.Ct. 1566; *Donnelly*, 874 F.2d at 410.

The Seventh Circuit also holds that *Donnelly* does not apply to the *Clark* case because Colleen Donnelly filed her state court action within ninety-days of her receipt of the right-to-sue notice. *Clark*, App. 1-6. Clark submits that since a pending state court discrimination action tolls Title VII's ninety-day statute of limitations, it makes no difference if the state discrimination action was filed prior to the issuance of the notice of right-to-sue or within ninety days of the issuance of the notice of right-to-sue. *Donnelly* holds that tolling occurs because a state discrimination action is pending in a state court: state courts and federal courts have concurrent jurisdiction over Title VII cases. See *Donnelly*, 110 S.Ct. at 1568-1570; *Donnelly*, 874 F.2d at 410. Nowhere does *Donnelly* hold that tolling only occurs when the state discrimination action is filed within ninety days after the issuance of the notice of right to sue. Finally, Clark submits that the statutory scheme of deferral to state proceedings will be frustrated if the ninety-day statute of limitations is not tolled during the time Title VII cases are pending before state courts and administrative agencies. Compare *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 913 (7th Cir. 1981); *Baptiste v. Furnco Construction Corp.*, 503 F.2d 447, 450 (7th Cir. 1974).

II.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT CASES WHICH HOLD THAT THE FEDERAL COURTS ARE THE ULTIMATE AUTHORITY TO SECURE COMPLIANCE WITH TITLE VII AND TO SUPPLEMENT STATE REMEDIES WHEN COMPLAINANTS ARE NOT MADE WHOLE.

The Seventh Circuit's decision in the *Clark* case also conflicts with the *Carey* case and with the *Gardner-Denver* case. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). *Carey* and *Gardner-Denver* hold 1) that final enforcement of Title VII is vested with the federal courts and 2) that the federal courts are empowered to supplement state remedies. See *Carey*, 447 U.S. at 64-65; *Gardner-Denver* 415 U.S. at 44-45; also see 110 Cong. Rec. 12724-12725. The Supreme Court must decide if the Seventh Circuit ignored *Carey* and *Gardner-Denver* when it affirmed the District Court's dismissal of Clark's Title VII complaint.

The facts establish that Clark filed his Title VII complaint in order to supplement his state remedies because he was never made whole by the Illinois courts or administrative agencies which heard his case: Clark never received all his back pay; Clark was never reinstated to his position at Western Union; and Clark never received his lost benefits. App. 18-19, pars. 10A-10H and 12. By affirming the dismissal of Clark's Title VII complaint, the Seventh Circuit's decision denied Clark his right 1) to have a federal court secure compliance with Title VII and 2) to have a federal court supplement the state relief and make him whole. See *Carey*, 447 U.S. at 64-65; *Gardner-Denver* 415 U.S. at 44-45; also see 110 Cong. Rec. 12724-12725.

The Seventh Circuit's decision is particularly egregious because the Illinois courts and agencies refused to make Clark whole for nine years before he filed his Title VII complaint. App. 18-19. Clark's discrimination case was deferred to the state court by Title VII. See 42 U.S.C. Sec. 2000e-5(c). Clark was informed by the EEOC in two letters that it would review the final finding of the HRC. App. 12-14. The Illinois Appellate Court remanded the Clark case back to the HRC for a rehearing on damages, but the EEOC never reviewed the final damage award because a damage award was never made during the remand to the HRC. App. 16-20. If Clark's Title VII rights expire while his deferred case is pending in state court (See *Unger v. Consolidated Foods Corp.*, 652 F.2d 909, 913 (7th Cir. 1981); *Baptiste v. Furnco Construction Corp.*, 503 F.2d 447, 450 (7th Cir. 1974), then Clark will be deprived of his right to resort to the federal courts to adjudicate his federal claims under Title VII and to supplement his back pay award when state courts and administrative agencies refuse to make him whole. See *Carey*, 447 U.S. 54, 64-65 (1980); *Gardner-Denver*, 415 U.S. 36, 44-45 (1974).

The federal courts refused to review Clark's damage award because, according to the Seventh Circuit, his complaint was untimely filed in the District Court. Clark's right to supplement his state damage award in federal court cannot be nullified because the EEOC erroneously issued a notice of right-to-sue while the *Clark* case was pending on remand before the HRC. See *Donnelly*, 110 S.Ct. 1568-170; *Donnelly*, 874 F.2d at 410. The Seventh Circuit's decision in *Clark*, if not reversed, will encourage the lower federal courts to disregard decided Supreme Court decisions: *Donnelly*, *Carey* and *Gardner-Denver*. Therefore, since Supreme Court decisions are the supreme law of the land, since the federal courts are the ultimate au-

thority to secure compliance with Title VII and, since the federal courts are to be used to supplement state remedies, the *Clark* case must be reversed because Clark was denied his right to have a federal court review and supplement the state remedy which did not make him whole. See *Carey*, 447 U.S. at 64-65; *Gardner-Denver*, 415 U.S. at 44-45; also see 110 Cong. Rec. 12724-12725.

CONCLUSION

In conclusion, Clark prosecuted his case in state forums for nine years and was never made whole. While his case was still pending before the HRC, Clark filed his Title VII complaint to supplement his state remedies, but the District Court and the Seventh Circuit dismissed Clark's complaint and denied Clark his right to have a federal court review and supplement his state remedy. The Seventh Circuit ignored *Donnelly*, *Carey* and *Gardner-Denver*. This Court will subvert Title VII, the statute which prohibits Western Union from discriminating against Clark on the basis of race and which provides Clark with remedies for Western Union's wrong, if the ninety-day limitations period in Title VII is used to protect Western Union and is used to bar Clark from being made whole by having a federal court supplement the HRC's award which did not make Clark whole. Congress never intended for the ninety-day limitations period to be used by the federal courts to protect a wrongdoer, like Western Union, or to bar a complainant, like Clark, whose case was deferred to and prosecuted in state forums for nine years, from being made whole. Therefore, if this Court is going to eliminate discrimination in the work place and effectuate Title VII,

then this Court must reverse the Seventh Circuit so Clark can have a federal court review and supplement the unsatisfactory relief he received from the state forums. See *Carey*, 447 U.S. at 67; *Gardner-Denver*, 415 U.S. at 44-45.

For all the foregoing reasons, Clark respectfully requests that this Court grant a Petition for a Writ of Certiorari to the Seventh Circuit to review this case.

Respectfully submitted,

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APPENDIX

that the Government should be allowed to purchase the
land at a price of \$100 per acre and to sell it at a
price of \$200 per acre. The Government should be
allowed to purchase the land at a price of \$100 per
acre and to sell it at a price of \$200 per acre.
The Government should be allowed to purchase the
land at a price of \$100 per acre and to sell it at
a price of \$200 per acre. The Government should
be allowed to purchase the land at a price of \$100
per acre and to sell it at a price of \$200 per acre.

WYOMING

THE GREAT WESTERN
AND PACIFIC

RAILROAD

App. 1

[UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 29, 1990*

September 12, 1990

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

JOE CLARK,

Plaintiff-Appellant,

No. 89-1048

v.

WESTERN UNION TELEGRAPH COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 8979—Milton I. Shadur, *Judge*.

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and the record.

ORDER

Joe Clark brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *ei seq.*, against his former employer, Western Union Telegraph Company, after he was demoted from his position as sales representative in 1978. Clark initially filed a charge of racial discrimination with what is now the Illinois Human Rights Commission (HRC). He cross-filed the same charge with the Equal Employment Opportunity Commission (EEOC); the EEOC deferred acting on his charge until the HRC issued its final disposition. In 1983 the HRC affirmed the findings and recommendations of an administrative law judge that Western Union discriminated against Clark on the basis of his race by demoting him, and that Clark be reinstated and awarded back pay and benefits. Dissatisfied with the HRC's back pay formula, Clark sought administrative review in the circuit court. In 1984 the circuit court affirmed the HRC's decision as to back pay, and Clark appealed to the appellate court. In 1986 the appellate court reversed, holding that the HRC abused its discretion in calculating the back pay award, and remanded the case to the HRC for reconsideration.

During the pendency of Clark's case before the HRC, the EEOC, on November 30, 1987, determined that it had no jurisdiction over Clark's discrimination charge pursuant to the Supreme Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). The EEOC accordingly sent Clark by certified mail a notice of his right-to-sue which stated that Clark had ninety days from the date of receipt of the notice to seek judicial review of the EEOC's determination. On December 14, 1987, the right-to-sue letter was delivered to the post office box designated by Clark as his mailing address. Clark shared the box with a woman named Rosie Inwang whom he autho-

rized to accept his mail. On December 29, 1987, the letter was returned to the EEOC after it had remained "unclaimed" for two weeks.

On October 11, 1988, Clark and his attorney visited the Chicago office of the EEOC to inquire about the status of Clark's case. They were informed that the right-to-sue letter had been issued and returned "unclaimed" to the EEOC. A copy of the original right-to-sue letter was given to Clark. Thirteen days later, on October 24, 1988, Clark filed the instant action.¹ On December 8, 1988, the district judge *sua sponte* dismissed Clark's action.² He concluded that the action was time-barred because Clark filed it more

¹ The same day, Clark moved the HRC to dismiss his case, with prejudice. The HRC granted the motion on October 28, 1988.

² Neither party raised any objection to the fact that the district judge dismissed Clark's complaint without Western Union ever having moved for such relief. We note, however, that Western Union's answer pleaded the ninety-day administrative deadline as an affirmative defense, and requested a judgment dismissing the complaint. The district judge, alerted to the timing issue, notified the parties that he contemplated a dismissal and ordered them to file, within ten days, legal and factual submissions on the issue. He thereafter conducted hearings before he ordered the dismissal of the complaint as untimely filed. Construing this order as an entry of summary judgment for Western Union (since the district judge accepted materials outside the pleadings), we conclude that it was proper for the district judge to act *sua sponte*. Clark had sufficient advance notice to present his submissions and full opportunity to establish the existence of disputed material facts prior to the district judge's summary disposition of his case. See *Horn v. City of Chicago*, 860 F.2d 700, 703 n.6 (7th Cir. 1988); see also C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure* §2720 at 27-28 (1983); cf. *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 414-16 (7th Cir. 1986) (*sua sponte* dismissal for failure to state a claim).

than ten months after the EEOC sent the right-to-sue letter to his post office box. Clark now appeals from this dismissal.³

Clark first contends that the ninety-day statutory period began to run on October 11, 1988, the date on which he actually received the right-to-sue letter from the EEOC, and therefore the complaint he filed in federal court thirteen days later was timely. We disagree. Under the fault approach set forth in *St. Louis v. Alverno College*, 744 F.2d 1314 (7th Cir. 1984), a plaintiff must take reasonable steps to ensure his actual receipt of the right-to-sue letter; otherwise, he will be deemed to receive the letter when it arrives at the most recent address that he provided to the EEOC. That is the situation here. The undisputed facts are that on November 30, 1987, the EEOC sent the right-to-sue letter to Clark at the post office box designated by him, and that the letter was marked "unclaimed" two weeks later and returned to the EEOC. This delivery to Clark's most recent address was sufficient to trigger the commencement of the ninety-day time limit. That Clark apparently failed to check his box over the two-week period is immaterial. See *Griffin v. Prince William Hosp. Corp.*, 716 F.Supp. 919, 921 (E.D. Va. 1989).

³ The failure of Clark's counsel to include in the appendix the district court's final judgment (R.20) along with its minute order raised an initial concern about our ability to hear this appeal. Ordinarily, a separate judgment must be entered before there is a final appealable order over which this Court may exercise jurisdiction. See Fed. R. Civ. P. 58 (separate judgment requirement); *Wikoff v. Vanderveld*, 897 F.2d 232, 236-37 (7th Cir. 1990). Given that the district court's judgment was, in fact, set forth on a separate document, we need not address the issue of the sufficiency of the minute order as a final decision in this case. Nevertheless, we remind counsel to consult Fed. R. App. P. 30 and Circuit Rule 30 in preparing appendices to the briefs.

As the district court pointed out, "What [Clark] provided the EEOC was the correct address, and it still is. Whatever private arrangements he may have made for picking up the mail at that post office box were his responsibility, not those of the EEOC or Western Union." (Tr. 27-2 at 6). Clark produced no evidence of any steps he took to reclaim from Rosie Inway the mail he authorized her to pick up. In the absence of such evidence, the district court properly concluded that Clark's delay in filing the Title VII action was his own fault.

Clark next contends that principles of equitable tolling apply to excuse his noncompliance with the ninety-day filing period. We again disagree. Although Clark correctly notes that this time period functions like a statute of limitations and is subject to equitable tolling, *see Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *McGinty v. United States Dep't of Army*, 900 F.2d 1114, 1118 (7th Cir. 1990); *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1314 (7th Cir. 1984), he misperceives the limited circumstances in which these principles apply. As we stated in *Jones*, "equitable tolling is to be restricted and reserved only for situations in which the claimant has made a good faith error (e.g., brought suit in the wrong court) or has been prevented in some extraordinary way from filing his complaint in time." 744 F.2d at 1314. *See also Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (suggesting that tolling is appropriate where the plaintiff is misled by the defendant or improperly notified of his rights by the court, or where a motion to appoint counsel is pending when the filing period expires). Clark's reasons for invoking equitable tolling—that the state forum refused to make him whole, that he aggressively prosecuted his case for ten years, that his state court action was pending when the EEOC dismissed his charge, and that the St.

Louis case is distinguishable from his case, simply do not meet this "good faith error" standard. And the cases that Clark cites as support are not analogous to his situation. See, e.g., *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (tolling rule for class actions); *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402 (7th Cir. 1989) (plaintiff's state law claim for employment discrimination which she filed in state court within ninety days of her receipt of the right-to-sue notice tolled Title VII's limitations period despite her failure to exhaust state administrative remedies), *aff'd*, 58 U.S.L.W. 4420 (U.S. Apr. 17, 1990) (No. 89-431).

Clark's remaining contentions regarding the propriety of the EEOC's dismissal of his charge, the fairness of the HRC's proceedings, and his entitlement to supplemental federal relief are irrelevant to the timing question, and therefore are not addressed here.

To the extent that Clark attempts to raise any arguments for reversal for the first time in his reply brief, these arguments are waived. See *Sims v. Mulcahy*, 902 F.2d 524, 536 n.5 (7th Cir. 1990).

Because Clark failed to meet the ninety-day requirement for filing his Title VII complaint, and because no basis for tolling exists, the judgment below is AFFIRMED.

App. 7

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITHOUT ORAL ARGUMENT

Date: September 12, 1990

BEFORE: Honorable Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 89-1048

JOE CLARK,

Plaintiff-Appellant

v.

WESTERN UNION TELEGRAPH COMPANY,

Defendant-Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 88 C 8979, Judge Milton I. Shadur

This cause came before the Court for decision on the
record from the above mentioned district court.

On consideration whereof, IT IS ORDERED AND AD-
JUDGED by this Court that the judgment of the District
Court in this cause appealed from be, and the same is
hereby, AFFIRMED, with costs, in accordance with the
order of this Court entered this date.

App. 8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 88 C 8979

Date: DEC 8 1988

Name of Assigned Judge: MILTON I. SHADUR

Case Title: Joe Clark v
Western Union Telegraph Co.

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

This Court finds that there is no need for an evidentiary hearing. This action is dismissed as untimely filed.

* * * * *

CHARGE OF DISCRIMINATION

Charge Numbers:

☒ State/Local Agency 1979CF0763

☐ EEOC 051790835

Illinois Fair Employment Practices Commission and
Equal Employment Opportunity Commission
(State or Local Agency)

Name indicate Mr. or Mrs.:

Joe N. Clark Jr.

Street Address

P.O. Box 49541

City, State and Zip Code

Chicago, Il. 60649

Named is the Employer, Labor Organization, Employment
Agency, Apprenticeship Committee, State or Local Gov-
ernment Agency Who Discriminated Against Me (if more
than one list below).

Name

Western Union Telegraph Co.

Telephone Number

(312) 435-1500

Street Address

427 S. LaSalle St.

City, State and Zip Code

Chicago, Il. 60649 (Cook)

Date Filed: 12/26/78

☒ RACE

Black

State Most Recent Continuing Discrimination For Race
(Month, day, and year) 12/20/78

The Particulars Are

- I. On 12/20/78, I was informed that my sales contract for 1979 would not be renewed. If my contract is not renewed, I would be demoted with a pay cut. I also feel that I am being underpaid with respect to white employees in similar positions as a major account representative.
- I. Joe Kohn, Area Manager, (white) stated that because of my performance my contract would not be renewed.
- II. I believe that I was discriminated against on the basis of my race, black, for the following reasons:
 - a) I am presently the only black account representative in the S.S.& S. District.
 - b) My performance was the highest in the district and in the Chicago area.
 - c) My base pay was lower than Gary Tasch (white) and Bruce Krarup (white) despite the fact that my sales performance was better and I retain the same amount of seniority in this position.

I also want this charge filed with the EEOC.

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charged in accordance with their procedures.

/s/ Joe N. Clark Jr.

[Received Dec. 27, 1978
EEOC Chicago Model Office]

App. 11

(Letterhead of)

STATE OF ILLINOIS
FAIR EMPLOYMENT PRACTICES COMMISSION

September 13, 1979

Mr. Howard L. Ward
1525 East 53rd Street
Suite 533
Chicago, Illinois 60615

Mr. Rod Fussinger
Area Manager
Western Union Telegraph Co.
427 South LaSalle Street
Chicago, Illinois 60605

RE: *Clark v. Western Union Telegraph Co.*,
Charge No. 1979CF0763

NOTICE OF SUBSTANTIAL EVIDENCE

The Commission has reviewed the charge and investigation in the above matter and has determined that there is substantial evidence indicating that an unfair employment practices has been committed as alleged. Therefore, the Commission is directed by law to endeavor to eliminate the effect of said alleged unfair employment practice and prevent its repetition by means of conference and conciliation.

Marilyn T. Kuhr has been designated by the Commission to conduct conciliation efforts in this case. Please contact her within 5 days after receipt of this letter to begin discussion of settlement possibilities. The conciliator may be reached by telephone at (312) 793-6262.

FAIR EMPLOYMENT
PRACTICES COMMISSION

/s/ Robert D. Jones
Legal Assistant

App. 12

(Letterhead of)

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
CHICAGO, ILLINOIS

In Reply Refer To:
December 28, 1978

Mr. Joe N. Clark Jr.
P.O. Box 49541
Chicago, Ill. 60649

Dear Mr. Clark Jr:

This office has received a charge filed by you with the Illinois Fair Employment Practices Commission and has been assigned our Charge No. 051790835 to that charge. Under our procedures, we will hold action on this charge until we are notified of the final disposition by the Illinois FEPC. At that point we will review the FEPC's disposition and make our own determination as to how to proceed. As of this date your charge is still under investigation by the State Agency. If you have any further questions regarding your charge, please contact the Fair Employment Practices Commission by calling (312) 435-6200 (FEPC Charge No. 1979CF0763)

You should also be aware that, 180 days following the filing of your complaint, if you wish to bring your own Title VII action, you may request, in writing, a Right-to-Sue Notice from this office and file suit in Federal Court. Such request, however, cannot be made until your charge has been on file with EEOC for 180 days.

Sincerely,

/s/ Charles Burtnae, fc.
Supervisory Equal Opportunity
Specialist

App. 13

(Letterhead of)

Chicago District Office
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

CERTIFIED MAIL NO. 615369035 615369034
CHARGE NO. 051790835

In Reply Refer To
July 27, 1984

Joe N. Clark Jr.
P.O. Box 49541
Chicago, Illinois 60649

Charging Party

Chief Executive
Western Union Telegraph Co.
427 South LaSalle Street
Chicago, Illinois 60649

Respondent

The above referenced-charge of employment discrimination, which had been filed with the Illinois Department of Human Rights (IDHR), also has been on file with the Commission.

At this time, we wish to inform you that, as a party to the charge, you are entitled to request us to review the final finding of the IDHR. For such a request to be honored, you must make your request in writing to this office within 15 days of your receipt of the IDHR's final finding.

Please be advised that this letter does not mean that the EEOC is now investigating this charge. It is only to inform you of your right to request of us a review after the IDHR has issued a final finding.

App. 14

If you have any questions regarding this letter, please contact our State and Local Coordinator, Marietta Morgan, at 312/886-5973. If you have not as yet received a final finding from the IDHR and wish to know the status of your case, please call the IDHR at 312/793-6200.

Sincerely,

/s/ Kathleen M. Blunt
District Director

App. 15

(Letterhead of)
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
CHICAGO, ILLINOIS

I have received a Notice of Right to Sue in the above mentioned cause.

10/11/88
Date

Joe N. Clark Jr.
Signature

On 10/11/88, Charging Party came to EEOC and inquired about the status of his case. He was informed that a Notice of Right to Sue had been issued and returned unclaimed to EEOC. Charging Party was given his Notice on 10/11/88.

/s/ Marietta Morgan
State & Local Coordinator

RECD OCT 11 1988
EEOC CHICAGO D.C.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF
JOE CLARK,

Complainant,

WESTERN UNION TELEGRAPH
COMPANY,

Respondent.

Charge No. 1979 CF 0763
ALS #2276

MOTION TO DISMISS

NOW COMES the Complainant, JOE CLARK, by his attorney, P. SCOTT NEVILLE, JR., and moves the Human Rights Commission, pursuant to Section 5300.780 of the Procedural Rules of the Human Rights Commission, to dismiss his case which is pending before the Human Rights Commission for the following reasons:

1. On October 11, 1988, JOE CLARK received a Notice of Right to Sue from the Equal Employment Opportunity Commission.

2. On October 14, 1988, at a Pre-hearing conference, Mr. Clark's attorney took the following action:

- A. He advised Judge Patton and Western Union's attorneys, Jon C. Jacobson and Roy Sears, that Joe Clark had received a Notice of Right to Sue from EEOC, and that Joe Clark had elected to

prosecute his case in the United States District Court; and

- B. He filed, with the Commission, a Notice of the Equal Employment Opportunity Commission's issuance of a right to sue notice and Clark's election to prosecute his case in the United States District Court.
3. Judge Patton asked Mr. Neville, Clark's attorney, how Mr. Clark wanted the Human Rights Commission to proceed with Mr. Clark's case.
4. Mr. Neville advised Judge Patton that Mr. Clark wanted the Human Rights Commission to stay the Human Rights Commission's proceedings pending a resolution of the Federal Court proceedings.
5. Judge Patton asked Western Union's attorneys if Western Union would agree to a stay and they informed Judge Patton that they would have to consult with their client.
6. Judge Patton informed Mr. Clark and his attorney and Western Union's attorneys that she would only grant the stay if Western Union would agree to the stay; otherwise, she would decide the motions pending before her and proceed, if requested by Western Union, to hear the *Clark* case.
7. Judge Patton continued the case until Monday, October 24, 1988 and asked the parties to file all motions on the aforementioned date.
8. Western Union's attorneys agreed to check with their client and to tell Mr. Neville whether Western Union would agree to a stay of the *Clark* case.

9. On Wednesday, October 19, 1988, Mr. Neville was advised by Mr. Sears that Western Union would not agree to stay the *Clark* case.

10. Mr. Clark does not feel that he can get Due Process, a fair hearing, if his case is heard by the Human Rights Commission:

- A. On January 11, 1983, the Human Rights Commission issued an order which promulgated a formula to award Clark his back wages and the order directed Western Union to reinstate Clark to the position he was demoted from on January 1, 1979.
- B. Joe Clark disagreed with the back wage formula, so he appealed the provision in the Human Rights Commission's order which awarded him back wages.
- C. Joe Clark was required by the Administrative Review Act to name the Human Rights Commission as a defendant when he appealed the Human Rights Commission's decision. See Ill.Rev.Stat. 1987, ch. 110, par. 3-107.
- D. Therefore, once Clark named the Human Rights Commission as a defendant in his appeal, the Human Rights Commission became Clark's adversary on the back wage issue in the Circuit Court, the Illinois Appellate Court and the Illinois Supreme Court.
- E. The Illinois Appellate Court has remanded Clark's case back to the Human Rights Commission.

- F. Clark feels that it is unfair for an Administrative Law Judge with the Human Rights Commission to sit as the trier of fact at the remand hearing on damages when the Human Rights Commission opposed his computation of back wages and was named as a defendant in the Circuit Court, the Appellate Court and the Supreme Court.
 - G. The hearing on Clark's damages will be tainted if the Human Rights Commission, which was not a neutral, detached and disinterested party in the Circuit Court, the Appellate Court or the Supreme Court is permitted to decide the damages awarded to Clark.
 - H. Finally, the Human Rights Commission has demonstrated its lack of concern for Clark and its inability to be fair by refusing to enforce its January 11, 1983 order directing Western Union to reinstate Joe Clark to the position he was demoted from on January 1, 1979: Joe Clark requested that the Human Rights Commission enforce its January 11, 1983 order on November 15, 1983.
11. The Human Rights Commission's procedural rules give Joe Clark a right to dismiss his case. See HRC, Procedural Rules, Section 5300.780.
12. Therefore, since the Human Rights Commission has opposed Joe Clark's computation of his back wages and has refused to enforce its order directing Western Union to reinstate Clark to his position, and since Section 5300.780 permits Clark to dismiss his case, the Human Rights Commission should dismiss *Clark's* case so the damages issue and all other remedy issues can be resolved in Federal Court.

WHEREFORE, Clark prays as follows:

- A. That Joe Clark's case will be dismissed; and
- B. That the Human Rights Commission will grant such other and further relief that is just and equitable.

Respectfully submitted,

P. SCOTT NEVILLE, JR.
Attorney for Complainant
70 West Madison Street
Suite 1400
Chicago, Illinois 60602
(312) 372-7955

Date: *October 24, 1988*

